THE HIGH COURT
COMMERCIAL

[2016 No. 11479 P.]

BETWEEN

MARIA KEENA

PLAINTIFF

AND
THOMAS COUGHLAN, RAY DONOVAN, MICHAEL DEMPSEY, PROMONTORIA (ARAN) LIMITED AND LUKE CHARLETON

DEFENDANTS

AND
BY ORDER
SEAMUS WALSH

FIRST CO-DEFENDANT

AND
KILKENNY WALSH LIMITED

CO-DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 18th day of January, 2019

1. The plaintiff claims that on 21st November, 2016, she entered into a contract with the fourth and fifth-named defendants to purchase the Ard Rí Hotel in Waterford for a price of €1.6m. She claims that the contract was entered into in a series of telephone conversations on that day between her representative, a Mr. Bob Lanigan, and a Mr. Terry Byrne, an employee of Cerberus European Servicing Advisors (Ireland) Limited, who she claims had authority to bind the fourth and fifth-named defendants. She claims also that this contract was evidenced in writing by a receipt for a deposit of 10% of the purchase price paid later that day, coupled with certain e-mails which followed payment of the deposit. On 30th November, 2016, her representatives were informed that she did not, in fact, have a binding contract and that the hotel was being sold to a different party. The hotel was sold later by the fifth-named defendant to the seventh-named defendant, Kilkenny Walsh Limited.

2. In these proceedings, the plaintiff seeks a declaration that there is an enforceable contract between her and the defendants for the sale of the hotel, an order for specific performance of that contract and certain other reliefs including damages in lieu of specific performance.

3. At the time when the plaintiff claims the contract was made, the property in suit was in the legal ownership of the first, second and third named defendants. The fourth named defendant was the holder of a legal charge over the property and had appointed the fifth named defendant as receiver of the property.

4. At the conclusion of the plaintiff's evidence, the fourth, fifth, sixth and seventh-named defendants made this application to dismiss the action. They claim that even if the plaintiff's evidence is accepted (which it is not), and taking the evidence of the plaintiff at its height the plaintiff has not made out a prima facie case in that the essential ingredients of a binding enforceable contract for the sale of the hotel have not been established and accordingly, that the action should be dismissed.

5. The principles governing an application of this nature are well established and the court is informed by the judgments of the Supreme Court in *Hetherington v. Ultra Tyre Service Limited & Ors* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R 544.

6. In *O'Toole v. Heavey*, Finlay C.J. outlined the rules which should be applied in a case where in an action either in tort or contract, at the conclusion of the evidence of the plaintiff, a defendant seeks a dismissal of the action on the basis that a case has not been made out. He summarised the position as follows:–

> "1. If an action is brought either in tort or contract against one defendant only, and if at the conclusion of the evidence for the plaintiff the defendant applies for a dismiss, then it seems appropriate that the trial judge should inquire from the defendant as to whether in the event of a refusal of that application the defendant would intend to go in to evidence.
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> 2. If, as occurred in the present case, the indication given by counsel in making the application is that, if refused, his client intends to go into evidence, then, it seems to me that the issue which has been raised as a matter of law before the trial judge is to reach a decision as to whether the plaintiff has made out a *prima facie* case…
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> 3. If upon applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff, whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied it appears to me that he must give judgment for the plaintiff…
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> 5. Where more than one defendant is sued and where claims or cross-claims for contribution have been made between the defendants on the basis that they are joint tort-feasors the trial judge should not, it seems to me, decide on an application for a non-suit made at the conclusion of the plaintiff's evidence unless he is completely satisfied that the eventual outcome of the case could not result in the patently unjust anomaly that a plaintiff having sued more than one defendant and one of the defendants having been dismissed out of the action at the conclusion of the plaintiff's evidence, the other defendant or defendants could escape liability by affixing blame through their evidence on the defendant already dismissed.
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> The only way, apparently, in most instances that a trial judge could satisfy himself that such a risk did not exist would be by ascertaining what the intention of all the defendants was in relation to the calling of evidence and the precise nature of the case which each of them would be making in the event of giving such evidence.
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> In the case, of course, where a plaintiff has not made out any form of plausible or arguable case against any of the defendants, it must remain clearly within the discretion of a judge to dismiss the action in its entirety at that stage."

7. In *Mooreview Developments Limited & Ors v. First Active plc* [2009] IEHC 214, Clarke J. (as he then was) cited with approval the

jurisprudence which he described as well settled and which was summarised in *Delaney & McGrath on Civil Procedure in the Superior Courts* where they state:–

> "In general the question of whether a party has discharged the burden of proof upon him by proving his case on a balance of probabilities is decided, once, at the conclusion of the case by the trier of fact. However, an issue will not even reach the trier of fact for this adjudication if a party fails to satisfy the evidential burden placed upon him to make out a *prima facie* case. Whether a party has done this can be tested by a defendant by means of an application to dismiss the plaintiff's case after it has concluded…on such an application the question for the trial judge is whether, assuming that the trier of fact was prepared to find that all the evidence of the plaintiff was true and taking the plaintiffs case at its highest, the defendant has a case to meet."

8. The learned judge then cited the Supreme Court decisions in *Hetherington* and *O'Toole* and continued his quote from *Delaney & McGrath* as follows:–

> "If the defendant indicates that he does intend to go into evidence if the application is refused, then the trial judge has to decide whether the plaintiff has made out a *prima facie* case. If, on the other hand, the defendant indicates that he does not intend to go into evidence on the issue of liability, if the application is refused, then the trial judge is required to determine whether, having regard to his view of the evidence of the plaintiff, the plaintiff has established as a matter of probability the facts necessary to support a verdict in his favour."

9. In this case, the first, second, and third-named defendants have taken no part in the proceedings. The fourth, fifth, sixth, and seventh-named defendants all indicated through their counsel that if the application for a dismissal is refused, they will adduce evidence. No claims for indemnity or contribution have been made between the defendants. Accordingly, this Court must now decide whether, if the evidence of the plaintiff is to be accepted as true and taken at its highest, the plaintiff has made out a *prima facie* case.

Background Facts and Chronology

10. The following chronology of events is taken from the evidence of the four witnesses called by the plaintiff: namely, herself, her father James "Jim" Treacy, friend of the family and business associate Mr. Bob Lanigan, and chartered accountant and financial advisor to the family Mr. Frank Wallace. Many of the facts recited are not in dispute, but others are. Having regard to the test to be applied in deciding on this application, the narrative assumes the truth of the plaintiff's evidence. With some exceptions, it draws largely on the evidence given by Mr. Bob Lanigan; a key witness at the trial and a central figure in the case.

11. The plaintiff is the daughter of Jim Treacy, an established Waterford-based hotelier. The Treacy family own and operate hotels in Waterford, Enniscorthy, Ennis, Monaghan, and Shannon.

12. The plaintiff grew up working in hotels owned by the family and learned the hotel business in doing so.

13. Although, she has, at least, one sibling who is not in the hotel business, her father and her brothers John, Anton, and Patrick, are all engaged in the management, operation and ownership to various degrees of hotels within "the group".

14. Mr. Lanigan has been a friend and business associate to Mr. Jim Treacy and to the family for over 40 years. It is said that from time to time, he has assisted the family in relation to business matters, particularly in the acquisition of properties.

15. Early in 2016, the family became aware that the Ard Rí Hotel, which had been closed for some time, was for sale through O Buachalla Auctioneers. Mr. Treacy asked Mr. Lanigan to make enquiries about purchasing the hotel. Mr. Lanigan says that Mr. Treacy informed him that he wanted the plaintiff to have this hotel.

16. Mr. Lanigan contacted Messrs. O Buachalla, without disclosing whether he was representing anyone other than himself, originally to be informed that they had gone "sale agreed" on the property but that if the sale did not proceed, they would revert to Mr. Lanigan.

17. Not having heard anymore, sometime later, Mr. Lanigan contacted Fergal Burke of O Buachalla's, who informed him that the loan secured on the property had been sold to an investment fund. Mr. Burke informed Mr. Lanigan that a company known as "Cerberus" were now dealing with the loan. He would try to find out who the contact person was and pursue the matter. These inquiries came to nothing and eventually Mr. Burke informed Mr. Lanigan that he should contact Cerberus directly.

18. Mr. Lanigan says that he made numerous attempts to contact Cerberus without success. In November 2016, a friend of Mr. Lanigan, Mr. Frank Power, informed Mr. Lanigan that he had been dealing with Cerberus on a different matter and gave Mr. Lanigan a contact telephone number for Cerberus. Mr. Lanigan tried calling this number, originally without success, but on Wednesday, 16th November, 2016, he called and spoke with a person who identified himself as Terry Byrne.

19. Mr. Lanigan asked Mr. Byrne about purchasing the property known as the Ard Rí Hotel. Mr. Byrne said that he was very late in coming to the table. Mr. Lanigan says that Mr. Byrne said that if "he could get in the region of €1.4m to €1.5m he would enforce the sale". The contents of this conversation are in dispute, but again for the purpose of this application, the court will accept that these words were used.

20. In the same conversation, Mr. Byrne and Mr. Lanigan discussed the possibility of Mr. Lanigan inspecting the property. Mr. Byrne said that he could arrange for this to be facilitated and put Mr. Lanigan in touch with a firm called "Capita". Arrangements were subsequently made for Mr. Lanigan to visit the property on the following day, 17th November, 2016. When Mr. Lanigan called to the property on 17th November, accompanied by an architect, Mr. William Hogan, he was informed by security that he could not have access to the property on that day.

21. Mr. Lanigan says that on Friday, 18th November, 2016, he received a call, he says, from a representative of Capita, informing him that the property had been sold to another party. On hearing this, Mr. Lanigan contacted Mr. Treacy and informed him that the hotel had been sold. Mr. Treacy said that this was not good news and asked Mr. Lanigan to contact Mr. Byrne again to ask if the purchaser "would like to make a quick turnaround on the investment". Mr. Lanigan suggested to Mr. Treacy that a figure in the order of €1.6m should be offered and he says that Mr. Treacy instructed him to proceed on that basis.

Monday, 21st November, 2016

22. On this day, a series of three telephone calls took place between Mr. Lanigan and Mr. Byrne, all in the early afternoon.

The First Call
23. Mr. Lanigan contacted Mr. Byrne. Mr. Byrne said that he was in the course of making a deal for the sale of the hotel with another party but that it was only a "shake of hands" and that no contract or deposit was in place. Mr. Lanigan said that the person he represented was very interested in the property and wanted to purchase it. This was the first time in which he stated that he was representing a party other than himself. He did not say who he was representing. Under cross-examination, Mr. Lanigan insists that not divulging the identity of the party he was representing was his way of doing business. Mr. Lanigan said that he would be prepared to offer to the other party a profit on its investment. Mr. Byrne said that he would "see what he could do".

The Second Call
24. Mr. Byrne called Mr. Lanigan back and asked if he would go to €1.75m. Mr. Lanigan responded in the negative, but that he was prepared to go to €1.6m. Mr. Lanigan says that Mr. Byrne then said to him "€1.6m it is then – how soon can you get me a deposit". Mr. Lanigan says that in this conversation he confirmed the purchase price of the hotel at €1.6m with Mr. Byrne. Again, nothing more was said about the identity of the party Mr. Lanigan was representing.

25. After this conversation, Mr. Lanigan telephoned Mr. Treacy and reported that the price for the hotel was agreed at €1.6m. He says that Mr. Treacy instructed him to go ahead and to make contact with the plaintiff to move the matter forward and arrange payment of the deposit.

The Third Call
26. Mr. Lanigan phoned Mr. Byrne to confirm that he would have the deposit of 10% of the purchase price that day. Mr. Byrne said the deposit would have to be non-refundable and Mr. Lanigan agreed to this condition.

27. Mr. Lanigan says that Mr. Byrne stipulated that the deposit should be paid on that same day to EY (formerly Ernst & Young) in the form of a bank draft for the sum of €160,000, being 10% of the purchase price, and that he, Mr. Byrne, would arrange that EY in Dublin stay late at their office to receive this. He would call Mr. Lanigan back to confirm that arrangement. The plaintiff's case is that, in these phone calls, the contract was made for the purchase of the hotel for €1.6m, subject to the condition that the deposit of 10% be paid that same day.

Events after calls between Lanigan and Byrne
28. This concluded the telephone conversations between Mr. Lanigan and Mr. Byrne on that day. Mr. Lanigan says that immediately after the conclusion of the third call, he received a phone call from Capita to say that a Mr. Chris Allen, of EY, Dublin, who was an agent of the receiver, Luke Charleton, would remain at the offices of EY in Dublin until approximately 8:30pm that evening for the purpose of receiving the non-refundable deposit.

29. Mr. Lanigan says that when he called Mr. Treacy to report that he needed the non-refundable deposit of 10% that day, Mr. Treacy said that he would take care of it.

30. Mr. Lanigan received a number of further calls during the afternoon of 21st November. He says that they were from Capita, requesting updates regarding payment of the deposit, whether there would there be any delay, and at what time was it expected that he would arrive at EY Dublin with the deposit. Mr. Lanigan says that he confirmed to the caller that everything was being taken care of and that the deposit would be delivered to EY but it would be later that day when they arrived at EY.

31. Evidence was given by each of the plaintiff's witnesses, except Mr. Wallace, as to the efforts made during the course of the afternoon of 21st November, to ensure that the deposit could be obtained in the form of a bank draft, including arrangements made between the plaintiff and her brother to call to the Ulster Bank branch in Waterford, with which they had a good relationship, to ensure that the draft could be obtained at such short notice.

32. At approximately 6:00 pm on 21st November, 2016, Mr. Lanigan, Mr. Treacy and the plaintiff left Waterford, by car, and arrived at EY, Dublin at circa 8:00 pm. There they met two persons, Chris Allen and Ciara O'Mongain. They took the lift to one of the upper floors in the offices of EY and general introductions were made. This was the first occasion on which the plaintiff or any member of the Treacy family was revealed to any of the defendants or their agents. No evidence was given as to what was said at the initial introductions in terms of the respective capacities of Mr. Lanigan, Mr. Treacy, or the plaintiff.

33. In the course of general conversation, Mr. Lanigan asked Mr. Allen how long he was receiver of the property. Mr. Allen said that the receiver is Mr. Luke Charleton, a partner in the firm of EY who had been appointed a few weeks earlier (Mr. Charleton had been appointed on 3rd November, 2016). When asked who had previously owned the property, Mr. Allen said that the "previous owners were Messrs. Coughlan, Donovan, and Dempsey". They were, in fact, the borrowers whose default had given rise to the appointment of Mr. Charleton as receiver.

34. The plaintiff then handed to Mr. Allen a bank draft drawn by Ulster Bank payable to "Ernest & Young" for the sum of €160,000. Mr. Lanigan says that Mr. Allen confirmed that this was 10% of the purchase price of €1.6 for the Ard Rí Hotel and adjoining lands.

35. Mr. Treacy requested a receipt for the deposit. Different accounts have been given in evidence as between the witnesses for the plaintiff as to what exactly transpired next in terms of the sequence of events and in particular, the sequence of signatures on the receipt. In response to the request for a receipt, Mr. Allen left the room and made a photocopy of the bank draft. He returned with an A4 page which included a photocopy of the draft itself and on which ultimately the following was written:-

> "This deposit is non-refundable, subject to title, freehold unencumbered
>
> Signature of C. Allen Signature of B. Lanigan Signature of M. Keena
>
> EY
>
> Signature of C. O'Mongain Signature of C. O'Mongain Signature of C. O'Mongain
>
> Witness Witness Witness
>
> [Copy of Ulster Bank draft for €160,000 payable to 'Ernest & Young']"

36. Mr. Lanigan says that Mr. Allen inserted initially the words "this deposit is non-refundable". Mr. Treacy then requested that Mr. Allen add the words "subject to title, freehold and unencumbered" which Mr. Allen did. Mr. Lanigan says that Mr. Allen then drew lines

on the page and requested that Mr. Lanigan and the plaintiff sign as purchasers and that Mr. Allen signed on behalf of Mr. Charleton.

37. In his witness statement, Mr. Lanigan says that Mr. Allen asked that he and the plaintiff sign as purchasers. However, in his evidence to the Court, he swore that he was signing only as a witness to the signature of the plaintiff as purchaser.

38. There was extensive debate and controversy during the cross-examination as to the sequence of signatures and the respective capacites in which Ms. Keena and Mr. Lanigan signed. What is clear, however, is that the receipt does not describe the capacity in which any of Mr. Allen, Mr. Lanigan, or the plaintiff had signed. The word "witness" appears directly under the signature of Ms. O'Mongain, who signed as such three times. Mr. Lanigan says that he believed that he was only witnessing the signature of the plaintiff as the purchaser and was unable to explain why only the signature of Ms. O'Mongain was described as that of a witness or why she so signed under all three signatures.

39. In the ordinary way, a receipt would be considered to be just that, namely evidence of the fact of a payment having been made and acknowledgment thereof and, for those purposes, would require the signature only of the recipient of a payment. However, in this case, the "Receipt" became the centre of much focus and is relied on by the plaintiff to be much more than a receipt for the payment of a deposit. Among other things, the plaintiff says that the receipt, either on its own or taken together with other e-mails and documents discussed below, constitutes a note or memorandum satisfying the requirements of s. 51 of the Land and Conveyancing Law Reform Act 2009. The following arise in relation to this Receipt:-

> (i) The words "this deposit is non-refundable" were added by Mr. Allen. The defendants submit that the addition of the words "subject to title, freehold unencumbered" at the request of Mr. Treacy had the effect of protecting the purchasers if the transaction did not proceed and that in the events that transpired they, in fact, never lodged the bank draft and returned it to the plaintiff's solicitor, Messrs. M.W. Keller & Sons, although Messrs. Keller & Son returned the bank draft to Messrs. Mason Hayes & Curran on 16th May, 2017. Taking the plaintiff's evidence at its height, it is clear that she and Mr. Lanigan, if perhaps not Mr. Treacy, believed that the deposit would be non-refundable.
>
> (ii) Insofar as the words "subject to title, freehold unencumbered" were added at the request of Mr. Treacy, this would have the effect of introducing a new condition to a contract, the terms of which had already been agreed, on the plaintiff's case, in the course of the phone conversations earlier that day between Mr. Lanigan and Mr. Byrne.
>
> (iii) On the face of the Receipt, there is nothing to say who were the parties to the transaction or the capacities of the respective signatories. The evidence of the plaintiff and of Mr. Lanigan is that the plaintiff signed as purchaser and that Mr. Lanigan signed only as a witness to her signature. Mr. Treacy's evidence is that the receipt was signed by both Mr. Lanigan and Ms. Keena, but that Mr. Lanigan "wouldn't have signed as the purchaser". Mr. Treacy, under cross-examination, stated that he didn't regard Mr. Lanigan as the purchaser and that the mention of Mr. Lanigan as a purchaser in his witness statement was a "slip". However, Mr. Treacy did accept that Mr. Lanigan signing it left open the possibility that the contract could have been taken in Mr. Lanigan's name in trust. While conflicting versions have been given, nowhere does any of the evidence go so far as to say that it was clearly agreed and intended by all those present that the plaintiff and only the plaintiff was signing as purchaser and that Mr. Lanigan's signature was only in his capacity as a witness. Further, only the signature of Ms. O'Mongain is described as that of a witness.

40. It has been said in the evidence that when Mr. Allen requested that there be signatures on the receipt, the plaintiff supposed that she said, to herself:–

> "I suppose I may as well, when I'm buying it."

However, the plaintiff made it clear to the Court that whatever monologue there was in relation to the identity of the purchaser, it was an internal one:–

> "…I didn't say it out loud, I was kind of just thinking it in my own head…I didn't say to him exactly 'It's me and only me is buying it and we're not buying it in a company name' or go into the whole rigmarole of it, but yes. And I was the one that handed him the deposit. Because the deposit came from me."

41. Furthermore, insofar as the plaintiff's own evidence is to the effect that the agreement was concluded earlier that afternoon:–

> "On that night there was no discussion, it was just we were up there to meet Chris Allen and give the deposit. But there was no discussion, as in he did not say to me that, or to any of us, 'Who is purchasing this property?' because the deal had been done with Terry earlier that day."

42. After all of the signatures were applied, a copy of the Receipt was made and Mr. Lanigan, the plaintiff, and Mr. Treacy left and returned to Waterford that night. Before they left, there was a brief conversation as to when the sale might close. It was said that Mr. Allen believed that Mr. Byrne would wish the sale to close before Christmas but that this might not be achievable having holidays taken by solicitors.

43. Mr. Lanigan swore that at no time was it intended by him or any of the Treacy family that he would have an interest in the hotel. His role was limited to making enquiries, approaching the vendor and negotiating a deal. His evidence did not go so far as to say that these limitations were ever communicated to the defendants or their representatives.

Events after 21st November, 2016

44. Mr. Lanigan says that the next morning he received a telephone call from Mr. Byrne requesting immediate proof of funds. This was the first time, according to Mr. Lanigan, that such a requirement was mentioned. Although noting that fact, and stating that it was a new request, Mr. Lanigan did not protest, apparently because he believed it could readily be complied with. He said that the Treacys' accountant would deal with this request.

45. Mr. Lanigan contacted the office of Frank Wallace, Accountant and Advisor to the Treacy family, to be informed that Mr. Wallace's mother had died and he would be out of the office until later that week. As matters transpired, Mr. Wallace was out of the office for the full week and returned on Monday, 28th November.

46. On Monday, 28th November, Mr. Lanigan spoke with Mr. Wallace, who agreed to arrange to send information regarding the availability of funds to complete the transaction. Mr. Wallace assembled the requested information and sent it to Mr. Allen that day.

47. Mr. Wallace gave evidence that on the following day, 29th November, he followed up with Mr. Allen. He says that he was unable to contact him but that on the morning of 30th November, he received a call from Mr. Allen to say that he was satisfied with the proof of funds but his instructions were that they were not proceeding with the sale to his client. Mr. Wallace was surprised and asked if an improved offer would change his mind. Mr. Allen said no and he is following instructions.

48. Mr. Wallace then reported on this call to Mr. Lanigan, Mr. Treacy, and the plaintiff.

49. Mr. Lanigan then contacted Mr. Allen who said that he should contact Capita. Capita informed Mr. Lanigan that he should contact Mr. Terry Byrne of Cerberus. When Mr. Lanigan spoke with Mr. Byrne, Mr. Byrne informed him that there was no deal. Mr. Lanigan did not question Mr. Byrne any further and the conversation ended abruptly.

50. The evidence of all the witnesses was that they were extremely surprised and disappointed at this communication since they believe that a binding agreement had been concluded for the purchase of the hotel.

51. Thereafter, the plaintiff, Mr. Treacy, and Mr. Lanigan attended at the office of the M.W. Keller in Waterford, the solicitors to the Treacy family, to instruct them as to what had transpired.

Correspondence and Pleadings

52. On 1st December, 2016, Messrs. M.W. Keller & Sons wrote to Mr. Allen in the following terms:-

> "Christopher Allen,
>
> EY Accountants,
>
> EY Building,
>
> Harcourt Centre,
>
> Harcourt Street,
>
> Dublin 2.
>
> 1st December, 2016.
>
> [*redacted*]
>
> Our reference MAK
>
> Re: Purchase of former Ardree hotel site consisting of 20.8 acres or thereabouts approximate measure at Ferrybank Waterford – Our Clients – Bob Lanigan and Maria Keena (in trust for Treacy Group)
>
> Dear Sirs,
>
> We confirm that we are acting for Bob Lanigan and Maria Keena (in trust for Treacy Group) who instruct us that they entered into a binding agreement (evidenced in writing) with you, as receiver, for the purchase of the above premises for the sum of €1.6 million. Our clients instruct us that both you and our client signed the said agreement and receipt and that the agreed deposit was handed over.
>
> Our clients further instruct us that, in part performance of that agreement, the deposit, a bank draft for €160,000 payable to Ernst & Young, was handed over and that you accepted the deposit on the understanding that it was binding, and non-refundable, subject only to title, freehold and being unencumbered.
>
> We are further instructed that our client produced evidence of proof of funds, despite the fact that it was not part of the aforementioned agreement that such evidence of proof of funds was required.
>
> We are instructed that you made a phone call to Mr. Frank Wallace of James F. Wallace & Co. chartered accountants on Wednesday 30th November last, and informed Mr. Wallace that you were not proceeding with the sale to our clients, as you had accepted an alternative bid.
>
> We are instructed to call on you to confirm that you will complete the sale of the above property to our client, as agreed, and unless we hear from you within 24 hours from the date hereof that you will honour the agreement with our client, we will be left with no alternative but to carry out our clients' instructions and issue proceedings for an injunction and/or specific performance, damages and costs.
>
> Furthermore, we also call on you to provide an immediate undertaking not to enter into any other arrangement to sell, convey, charge or otherwise alienate the said property, failing which we reserve our client's right to seek all interim and/or interlocutory relief necessary to indicate our client's rights.
>
> This letter will be relied upon to fix you with the costs in any legal action taken from your failure to provide the confirmations sought herein.
>
> Yours faithfully,
>
> M.W. Keller & Son."

53. On 6th December, 2016 Mason Hayes & Curran replied to M.W. Keller on behalf of their clients "Promontoria (Aran) Ltd and Luke Charlton, Receiver". They referred to the appointment of the receiver and confirmed that they were acting for both the receiver and for Promontoria.

54. Mason Hayes & Curran stated that they are instructed that no agreement was entered into by the receiver with the clients of Messrs. Keller, whether in writing or otherwise and they noted that no such agreement was provided with the letter of 1st December,

2016.

55. Messrs. Mason Hayes & Curran informed Messrs. Keller that the bank draft for the deposit had not been cashed and would be returned to their clients by the receiver directly.

56. On 12th December, 2016, M.W. Keller replied to Mason Hayes & Curran

57. Again they headed the letter "Our clients Bob Lanigan and Maria Keena (in trust for Treacy Group)". The letter states as follows:

> "Our clients do not accept that there was no agreement entered into with your clients for the purchase of the above premises. We enclose you copy agreement, signed on behalf of your client by Christopher Allen. You will note from the document that the deposit paid was non-refundable, and therefore our clients could not have sought the refund of the money paid in the event that your clients failed to complete the contract. You will note also that the agreement is not subject to contract nor is it subject to proof of funds.
>
> Indeed, the document is very significant evidence of part performance of the agreement, which is further evidenced by the payment of the sum of €160,000. Moreover, evidence of proof of funds was also provided despite the fact that proof of funds was not a requirement of the agreement."

58. Although no copy of an agreement was in fact enclosed with the letter of 1st December, 2016 it appears that there was sent, separately, to Mason Hayes & Curran, as the "agreement", a copy of the Receipt.

59. On 21st December, 2016 Messrs. Mason Hayes & Curran replied again, denying the existence of a contract.

60. Messrs. Mason Hayes & Curran initially requested from Messrs. Keller details of where to return the deposit. When this was not provided, Messrs. Mason Hayes & Curran sent the bank draft to M.W. Keller & Sons. Messrs. Keller returned it to Messrs. Mason Hayes & Curran on 16th May, 2017. Ultimately, on 26th May, 2017, Mason Hayes & Curran acknowledged that the deposit had been returned to them and made clear that their position was clear and that the bank draft would not be lodged or negotiated in any other way.

61. On 23rd December, 2016 the Plenary Summons was issued.

62. On the copy of the original Plenary Summons seen by the Court, the plaintiff is described as "Maria Keena (in trust)", with a handwritten line deleting the words "in trust". On the back page of that copy the plaintiff is described as "James Treacy (in trust)".

63. There was some debate during the hearing as to who made the deletion of the words "in trust", being either the central office of the High Court or Messrs. Pearts as town agents for Messrs. Keller. No evidence was given on this point, but the plaintiff says that the deletion was made by Messrs. Peart before the Summons was issued.

64. A certificate of registration of a *lis pendens* was issued by the Registrar on 3rd January, 2017. In the original application for a *lis pendens* signed by the plaintiff on 22nd December, 2016, the plaintiff is again described as "Maria Keena (in trust)", with the words "in trust" deleted in handwriting. Thereafter all of the pleadings, affidavits and other exchanges describe the plaintiff as Maria Keena.

65. The title to the proceedings and the various titles to the letters issued by Messrs. Keller do not of themselves constitute definitive evidence as to the true identity of a contracted purchaser. However, at a minimum they illustrate a measure of confusion or, possibly disagreement on the part of and as between the plaintiff, Mr. Lanigan, Mr. Treacy, and Messrs. Keller as to the identity of the purchaser at the dates of the letters and commencement of the proceedings.

66. The plaintiff's claim is that a binding contract for the sale of the property to her was entered into in the course of the telephone conversations between Mr. Lanigan and Mr. Byrne during Monday 21st November, 2016. The claim is that the agreement was to sell the property to the plaintiff for the sum of €1.6 million and that the agreement was conditional only on the delivery of a deposit of 10% that day. On that case, the purpose of the visit to EY was to comply with that condition and not to continue negotiations or agree new or additional terms or expand on the detail of the agreement. The only persons who participated in the telephone calls during which it is alleged that the agreement was made were Mr. Byrne and Mr. Lanigan. On Mr. Lanigan's account of the calls he had not disclosed the identity of the plaintiff. The furthest he went was to say in one of the phone calls that the person he represented was very interested in the property and wanted to purchase it.

67. It was not until the meeting at eight o'clock that night that the identity of the Treacys was revealed. Even then, no evidence was proffered that in that meeting there was clear agreement – which would have to have been "supplemental" to the agreement made in the earlier phone calls – as to who would be the purchaser. The only documentary evidence from the meeting is the Receipt which does not say who were the named vendors or purchaser.

68. Much of the above description of events is based on the evidence given by Mr. Lanigan, principally because he was the only person to engage with the defendants or any of their representatives in relation to the formation of the contract as claimed up to the time when the plaintiff says that the agreement was made. It is informative however to consider the evidence of the other witnesses insofar as it is relevant.

Evidence of the Plaintiff

69. The plaintiff gave evidence of her personal, family, and business background including her hotel experience. Although she has a general interest in the other hotels in family ownership, her primary ownership and responsibility now is for the Shannon Estuary Hotel. However, she developed a particular interest in the Ard Rí Hotel because it is located in Waterford within a short traveling distance from her home. She has a busy and young family and it would be particularly suitable for her to own and operate that hotel into the future.

70. The plaintiff said that under the family arrangements as understood among them it was always the intention that each family member who is in the hotel business would have ownership and control of a hotel. She said that even before the events giving rise to this case she and her father had discussed the prospect that if the Ard Rí came up for sale it would be bought for her. When Mr. Lanigan was making his approaches to O Buachalla and then to Cerberus she was kept informed. There has been no suggestion however, even on her account, that she was kept any more informed by Mr. Lanigan than was her father Mr. Treacy. If anything, it appears from their evidence that at the time of critical events, Mr. Lanigan treated Mr. Treacy as the person from whom he should take instructions and to whom he would report.

71. The plaintiff could not, of course, give direct evidence of the conversations between Mr. Lanigan and Mr. Byrne. Her evidence included a description of those conversations, as reported by Mr. Lanigan as a "deal done". She made the necessary arrangements to obtain, from Ulster Bank, the draft for the deposit and she drove to Dublin to meet at EY, along with Mr. Lanigan and Mr. Treacy.

72. In her evidence concerning the meeting at EY the plaintiff insisted that Mr. Lanigan's signature was only as a witness to hers as the purchaser. Two difficulties arise with this even from the face of the Receipt itself:-

> (i) The only signature on the receipt which is described as a witness signature is that of Ms. O'Mongain, appearing in three places on the receipt.
>
> (ii) There is nothing on the face of the receipt to state the capacity in which any of the persons were signing.

73. The initial correspondence from M.W. Keller refers to the Receipt as the agreement, and later, in pleadings and submissions, importance is attached to it in the context of s. 51 of the 2009 Act. However, none of the witnesses, including the plaintiff, have suggested that the attendance at EY was intended to be more than delivery of the deposit in compliance with the only condition of the agreement the plaintiff says was made earlier that day, in telephone calls about which the plaintiff could give no evidence. The plaintiff's evidence is that she believed that, through the calls between Mr. Lanigan and Mr. Byrne, she had concluded an agreement to purchase the property and that this was always the intention in her mind and in the minds of Mr. Treacy and of Mr. Lanigan. Even accepting that evidence it does not go so far as to establish that an agreement was made with the defendants, a term of which was that she was the agreed purchaser.

Evidence of Jim Treacy

74. Mr. Treacy gave evidence consistent largely with that of the plaintiff. He described the family hotel history and current ownership and management arrangements and how he intended that the Ard Rí be acquired for the plaintiff. Obviously, also, he could not give any direct evidence of the communications between Mr. Lanigan and Mr. Byrne but he gave evidence of the instructions he gave from time to time to Mr. Lanigan and of the reports and updates he received from Mr. Lanigan. Mr. Treacy says that he instructed Mr. Lanigan to actively pursue the Ard Rí and it would be purchased for his daughter Maria.

75. Mr. Treacy attended at EY on the night of 21st November when the draft for the deposit was being handed over. He said that the Receipt was signed by Mr. Allen on behalf of Mr. Charleton and by the purchasers: Mr. Lanigan and Ms. Keena. The designation of Mr. Lanigan as a purchaser was later disputed by Mr. Treacy under cross-examination, but he conceded that the signature of Mr. Lanigan left a degree of ambiguity about what to be done with the property. He was also party to the general conversations which took place at EY that night regarding such matters as when the sale might close.

76. As regards the wording appearing on the receipt itself Mr. Treacy said that the words "subject to title, freehold title, unencumbered" were added for "protection". As a matter of basic logic this can only mean a qualification to the words "this deposit is non-refundable" to the effect that if the vendors were unable to deliver unencumbered freehold title the deposit would be returned. If this were the case, then it would represent a modification of the terms of the agreement which the plaintiff and Mr. Lanigan asserted was made in the phone calls earlier that day, whereas it is the plaintiff's case that the deposit was non-refundable, and, in correspondence between M.W. Keller and Mason Hayes & Curran, the plaintiff declined to accept the return of the deposit.

77. For the purpose of this application, the Court accepts Mr. Treacy's evidence that he intended that the property would be purchased for the plaintiff. If that was his intention, he failed to communicate it to M.W. Keller before they wrote the letter of 1st December, 2016, and when they were preparing the summons. In this regard, the plaintiff submitted that Messrs. Keller simply erred when writing the letter.

78. Critically, Mr. Treacy also acknowledged in evidence that when the deal was being done no decision had yet been taken as to who or what the purchasing entity would be. He said that these were matters which could be worked out later.

79. The defendants state that the question of the identity of the purchaser was not simply a detail which could be worked out later but a fundamental one of the "three Ps" which must be established (see discussion at paras 105 et seq. below).

Evidence of Frank Wallace

80. Mr. Wallace is the principal of the firm of John F. Wallace, Chartered Accountants, Waterford. He acted as accountant for the Treacy family for over twenty years and is also auditor to a number of the companies through which the Treacys operate hotels.

81. Mr. Wallace had no role in the events immediately leading up to and which occurred on 21st November, 2016. His first direct engagement was on 28th November, 2016 when he sent to Mr. Allen the financial information to evidence the availability of funding.

82. On 29th November, 2016 Mr. Wallace made a telephone call to Mr. Allen to follow up his letter of 28th November, 2016. On 30th November Mr. Allen spoke with Mr. Wallace and acknowledged that the proof of funds was satisfactory but in the same conversation informed Mr. Wallace that the sale was not proceeding. Mr. Wallace then asked if an improved offer would change the vendors mind but was informed that it would not.

83. Mr. Wallace says that no reason was given and it seemed to him that Mr. Allen was embarrassed and apologetic. Mr. Wallace said that his client had the funds to complete, without the need to recourse to any new borrowing.

84. Mr. Wallace also gave evidence as to the ownership of the hotels by the Treacy family and the corporate structures. I shall consider the relevance of that evidence elsewhere in this judgment.

85. Mr. Wallace gave evidence regarding his professional experience of receivership matters, having himself acted as receiver and liquidator to a number of companies. In particular, he said that in cases where he was appointed a receiver, the traditional practice would have been that although certain bank consents would be needed for the ultimate sale, the bank, having appointed a receiver, typically leave it to such a receiver to conduct any negotiations with purchasers and deal with enquiries relating to the asset being sold, and not itself engage directly with potential purchasers.

Funding

86. Evidence was given both direct and under cross examination as to the source of funding available firstly for the payment of the deposit, secondly to demonstrate the availability of funding to complete the transaction and thirdly, but of less relevance, as to funding available for the development of the property.

87. The letter from Mr. Wallace to Mr. Allen dated 28th November, 2016 stated as follows:-

> "Dear Chris,
>
> Further to our telephone conversation this morning, we enclose herewith bank statements (to hand) which total in excess of the money required.
>
> In addition, several children of the Treacy family would have €200,000 each as they all received €250,000 in recent times.
>
> As I have assured you earlier, there is absolutely no issue at all with the Treacy group having funds to close this arrangement.
>
> You will note in the bank statements of Timbertoes, has the money for some considerable time despite the fact that we withdrew €2.25 million from it since it commenced trading in 2013.
>
> Please confirm that you are satisfied that funds are in place.
>
> I am going into a meeting now but you could text my mobile number on [*redacted*]. I look forward to hearing from you.
>
> Yours faithfully."

88. The enclosures to this letter included bank statements relating to family companies including Timbertoes Limited, Treacys Waterford Limited and Leisure Centre Limited and bank statements of "Maria Keena, Edward Keena (the plaintiff's husband) and James Treacy", "Treacy JMB Farm" and "Treacy JMB Number 3". Much was made by the defendants of the fact that the funding evidenced was not the plaintiff's own funding, but comprised funds available in a variety of accounts held by different family members and companies through which the family operated their businesses. In response the plaintiff says that it matters not to the determination of this case that the funding would have been made available from such a variety of sources.

89. It is potentially of some interest in understanding the circumstances of the case that the plaintiff would be relying on such sources, but I consider that the fact that a purchaser is sourcing its funding from other parties, whether connected to the purchaser or not, would not undermine its right to assert and enforce the contract were it otherwise entitled to do so.

The Treacy Group

90. Extensive evidence was given by witnesses for the plaintiff regarding the affairs of the Treacy family generally and their interests in hotels. Some of these hotels are held through family companies, but there is no corporate "group" of companies in the legal sense envisaged by parts of the Companies Acts or tax legislation. Mr. Treacy gave evidence that because he had encountered a bad experience in connection with a business venture in which he had collaborated with his brother many years previously, he was determined that as the family interests grew, each family member would enjoy autonomy in respect of the individual hotels. Whilst the "collective wealth" could be utilised to expand the assets and acquire additional properties and support each other's business such as the Ard Rí, this did not mean that this asset once acquired would fall into "the group". Mr. Treacy and the plaintiff, supported by Mr. Lanigan and Mr. Wallace, all gave evidence that, however it would be acquired in the first instance, their intention was that this property, when acquired, would be owned by the plaintiff. As to the structure by which it would be held for the plaintiff, this remained to be decided.

91. For a purchaser to reserve, until after the completion of the acquisition of an asset, certain decisions, informed by tax and legal considerations, as to a structure by which the asset would be held is not unusual or improper. However, in this case, even accepting the plaintiff's evidence, there is no evidence that agreement was reached with any party on behalf of the defendants as to the identity of the purchaser, even in the first instance. The defendants have submitted that there is no agreement as to the identity of both the vendor and purchaser in the contract being asserted in these proceedings. I agree and I propose to consider each of these issues separately.

Identity of Vendor

92. The first, second and third named defendants are the legal owners of the property known as the Ard Rí Hotel. They had no dealings with the plaintiff and have taken no part in these proceedings.

93. The fourth-named defendant is the holder of a legal mortgage over the interest of the first, second and third-named defendants made originally on 13th July, 2006, between the first, second and third-named defendants as borrowers and First Active plc. The fourth-named defendant acquired that security on 12th February, 2015.

94. On 3rd November, 2016, the fourth-named defendant appointed the fifth-named defendant to be receiver of the charged property.

95. The evidence of the plaintiff is that when Mr. Lanigan sought to pursue the possibility of acquiring the property, he was informed by the agent, O Buachalla, that the loan secured on the property had been acquired by "Cerberus". Accordingly, he made contact with Cerberus. The precise legal status and standing in the matter of Cerberus was not the subject of evidence or detailed submissions. Mr. Terry Byrne was an employee of Cerberus and it is with Mr. Byrne that Mr. Lanigan engaged and with whom the agreement is alleged to have been made.

96. Reference was also made to a company called "Capita", now "Link". Its employees relevant to the events that transpired in this case are Mr. Andrew Geraghty and Mr. Darren Das.

97. The fifth-named defendant, Mr. Charleton, is a partner in EY (formerly Ernst & Young). On 3rd November, 2016, he was appointed receiver of the property by the fourth named defendant.

98. Two employees of EY are also relevant, namely Mr. Chris Allen and Ms. Ciara O'Mongain, the persons who met the plaintiff, Mr. Lanigan, and Mr. Treacy on night of 21st November, 2016. They are members of Mr. Charleton's team at EY.

99. It is said by the defendants that neither Cerberus, nor Link, nor any of their employees had authority to bind either the fourth or fifth named defendant. It is also said by the defendants that none of the employees of EY, namely Mr. Allen or Ms. O'Mongain had any authority to bind any of the defendants.

100. I am not on this application determining the question of authority to bind the defendants, whether actual or ostensible. I must, for this purpose, accept that the evidence given by the witnesses on behalf of the plaintiff is that they believed that when they were dealing with Mr. Byrne and Mr. Allen they were dealing with persons who had authority to sell the property.

101. If I take the plaintiff's evidence at its height, it would be somewhat unsatisfactory that the fourth defendant would, having appointed a receiver with a view to selling the property, permit its advisory firm Cerberus to enter negotiations regarding the sale of the hotel, including such a critical item as the price. It appears that the manner in which Mr. Byrne communicated with Mr. Lanigan at the minimum, brought about a degree of confusion as to the extent as to the identity of the vendor.

102. On a number of occasions during their evidence, witnesses were asked who they believed was the vendor of the property. They variously replied that it was Cerberus, or Mr. Allen, or Mr. Charleton, or Ernst & Young. Therefore, on their own evidence, they do not appear to have known who was the vendor of the property.

103. The originating letter of the 1st December, 2016, was addressed to Mr. Allen. The reply from Mason Hayes & Curran identified as their client the fourth and fifth-named defendants. In commencing these proceedings, thereafter, the plaintiff then chose to name the fourth and fifth-named defendant as the vendors.

104. If a purchaser was serious about acquiring a property, one would expect it to make its own enquiries at the earliest stage, as to the identity of the vendor. However, it seems to me that the inability of the plaintiff, in her evidence, to clearly identify the name of the vendor is caused in part by the manner in which the defendants and their representatives conducted themselves, in particular Mr. Byrne's engagement and indications that at a certain price, he would "enforce the sale". If this application were refused, this analysis would, of course, be revisited having regard to the evidence of the defendants, but in circumstances where the plaintiff alone cannot be faulted for failure to identify the vendor, I am not prepared to grant the application on this ground.

Identity of Purchaser

105. The defendants submit that the evidence of the plaintiff's witnesses admits of several different possibilities as regards the identity of the purchaser. They submit that it is not necessary for this Court to determine which of those was, in fact, the intended purchaser, but that if the court cannot have certainty as to the identity of the purchaser as a party as to the agreement, a *prima facie* case has not been made out and this Court could never grant a declaration on the terms sought in these proceedings. The defendants refer to the evidence given that the exact identity of the purchasing entity was a detail to be worked out later after taking tax and legal advice as regards structuring. The defendants submit that, on the contrary, the identity of the purchaser is one of the "three Ps" and therefore is so fundamental that without knowing it the Court cannot declare the existence of a binding contract, let alone grant the remedy of specific performance.

106. The defendants submit that the evidence admits that the possibility that any of the following could have been the purchaser, in addition to the plaintiff herself:-

(i) the plaintiff and Mr. Lanigan;

(ii) the plaintiff "in trust"; and

(iii) Mr. Lanigan.

107. The defendants submit that the court does not have to make a finding as to which of these possibilities is the correct one, but only to find that on the evidence given by the plaintiff's witnesses, it is not known with any measure of certainty who even the plaintiff or her witnesses believed would be the purchaser, much less who they would say it was agreed with the defendants would be the purchaser.

108. The witnesses are consistent in their repeated assertions that the intention, known to everyone on the plaintiff's side that the hotel would be acquired for the plaintiff. But none of them offered evidence that it was agreed with the defendants that the purchaser would be the plaintiff.

109. In particular, the plaintiff has acknowledged in their evidence that the "detail", as her witnesses described it, of who would be acquiring and holding the hotel, had not been decided on 21st November.

Fundamentals of the Contract – Relevant Principles

110. It is trite law to recite that the key ingredients of establishing a binding legal contract are offer, acceptance, consideration and intention to create legal relations. Again, taking the evidence of the plaintiff as accepted for the purpose only of this application it seems clear that there was an offer made and accepted, for a stipulated consideration. There may be separate legal questions as to whether Mr. Byrne was authorised to accept the offer and separate questions may arise as to whether on all sides there was, in fact, an intention to create legal relations. However, if the court accepts the evidence of the plaintiff on this application, these tests have been satisfied.

111. The defendants submit that it is "improbable" that a receiver appointed by a secured lender, who, under the mortgage, acts as agent of the borrowers and has fiduciary duties, would enter into a binding contract for the sale of the charged property on the basis of a few phone calls, and without requiring a comprehensive contract, typically in the form of the standard Law Society conditions to be negotiated and executed by all parties.

112. It is well established that whilst relatively unusual, it is open for a court to hold that a binding and enforceable contract has come to existence even where the parties expressly contemplate that the oral agreement will later be formalised into a written contract. In *Greenband Investments v. Bruton & Ors* [2009] IEHC 67, Clarke J. said the following:–

> "…parties may also enter into oral discussions which cannot be properly characterised as involving either an express or an implied intention that the discussions concerned should not, if successful, to give rise to a contract between the parties. In such circumstances, provided all of the relevant prerequisites for a binding contract are in place, then there is no reason why a court should not conclude that there is an oral agreement between the parties which amounts to a contract. It will, of course, be the case that any such oral agreement will not be enforceable unless and until there comes into existence a note or memorandum sufficient to satisfy the Statue of Frauds or a sufficient act of part performance to render it inequitable to allow a party resisting enforcement of the contract to rely on the absence of such a note or memorandum.

> It should be noted that the fact that the parties may contemplate the possibility (or indeed the likelihood) that their oral agreement may come to be formalised in a written contract does not, of itself, necessarily give rise to an inference that the parties did not intend their oral agreement to be a contract. There is nothing, in principle, wrong with parties entering into an oral contract but contemplating that the terms which they have agreed will be incorporated into a more elaborate document. Whether this can be said to have occurred on the facts of any individual case depends, of course, on the evidence."

113. The plaintiff acknowledged, in evidence, that she would have expected that in due course, a full contract, of the type which she has seen in other property transactions, would be drafted and executed. However, applying the principles summarised by Clarke J. (as he then was) in *Greenband v. Bruton & Ors* [2009] IEHC 67, the absence of such a contract is not fatal to the claim in these proceedings.

114. Later in this judgment, the Court considers the adequacy or otherwise of the documents relied on for the purpose of s. 51 of the 2009 Act. However, even before turning to that subject, it is well established that for any contract to be concluded and binding, there must be agreement on the essential or material terms. In the case of a contract for the disposal of an interest in land, the essential terms are, at a minimum, the so-called "Three P's" namely the parties, the property and the price (*Godley v. Power* (1961) 95 I.L.T.R. 135 and *Black v. Grealy* [1977] IEHC 145).

Was there a concluded agreement?

115. For the reasons outlined earlier, I find that even taking the evidence of the plaintiff's witnesses at its height, the plaintiff has been unable to identify with any degree of precision whatsoever, the parties to the contract alleged. For reasons already mentioned, I do not regard the failure to specify with clarity the identity of the vendor as fatal to the plaintiff's case in that to the extent that the plaintiff has been unable to specify the name of the vendor, this inability is, at least, contributed to by the manner in which certain of the defendants have organised and administered their affairs.

116. As regards the identity of the purchaser, the plaintiff's witnesses have been remarkably consistent in their assertions that it was always intended that the hotel would be acquired for the plaintiff. However, one searches in vain for any evidence that any of the witnesses identified the plaintiff as the purchaser in the course of making the agreement alleged. Two particular considerations arise in this regard.

117. Firstly, as regards the phone calls during the course of the day, Mr. Lanigan, for the first time, mentioned that he was representing another party, but did not disclose the identity of that party. He insisted that it was his way of doing business efficiently to advance a negotiation of this type observing the confidentiality of the party he was representing. The case made here is that the contract was concluded in those phone conversations, the agreement being conditional only on one condition namely that the deposit would be delivered that day. Yet, he did not identify the purchaser in those calls. It is also not unusual or improper for a party negotiating on behalf of a purchaser to withhold the identity of his "principal" until a late stage, provided the vendor is willing to negotiate on such a basis. However, in this case, the plaintiff asserts that the "deal was done" during these telephone conversations, at a time when the name of the purchaser had not been revealed and clearly, therefore, the first of the "three Ps" has not been agreed.

118. Secondly, the purpose of the meeting at EY was deliver the deposit. Even on the evidence of the plaintiff's witnesses alone, different versions have been given to what transpired as to the sequence of signatures on the receipt and it is open to this court, although accepting the plaintiff's evidence in general, to have regard to any inherent inconsistencies or contradictions in that evidence (see *Mooreview*). For all the assertions that the plaintiff was the intended purchaser, nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the purchaser and the Receipt does not describe the capacity in which any of the three relevant persons signed.

119. The Court has a degree of sympathy with the plaintiff and her father in that it appears, on their evidence, that they truly believed that Mr. Lanigan was doing no more than facilitating the transaction and was never going to be the purchaser. However, this belief on their part appears to have translated itself into a belief also that the defendants knew or ought to have known not only that Mr. Lanigan was the not a purchaser, but also ought to have known the exact identity of the purchaser. Whilst those beliefs may have been genuinely held, the evidence does not support the claim that the identity of the purchaser was agreed with any of the defendants.

The Note or Memorandum

120. As per Keane J. (as he then was) in *Silver Wraith v Siúicre Éireann* (Unreported, High Court, 8th June, 1989), the question of whether there is a sufficient note or memorandum to satisfy the Statute of Frauds, and now the Act of 2009 "only becomes relevant if there is a concluded agreement in the first place." I have found that the plaintiff, even on the evidence, has not made out a *prima facie* case having regard to the absence of evidence of any agreement as to who would be the purchaser. However, even if this were not the case, it is appropriate to consider whether, again, even on the plaintiff's evidence, there exists a note or memorandum such as meets the requirements of s. 51.

121. It is accepted and uncontroversial law that a full written contract is not required to enforce an agreement for the sale of land in Ireland. S. 2 of the Statute of Frauds (Ireland) 1695 required that for such an agreement to be enforceable:–

> "…the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

122. The Land and Conveyancing Law Reform Act 2009 has since superseded the Statute of Frauds (Ireland) 1695 in relation to contracts pertaining to land. However, s. 51(1) of the 2009 Act substantially replicates the requirements of the 1695 Statute:–

> "…no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent."

123. In *Specific Performance in Ireland*, (at p. 60) Buckley, Conroy, and O'Neill have noted that as "the wording is so closely analogous to the Statute of Frauds, it is extremely unlikely there will be any significant deviation from the existing case law on writing requirements". The Court agrees with this statement, apart from noting that the established equitable doctrines, such as the doctrine of part performance, are preserved by s. 51(2).

124. In *Contract Law* (2nd edn.), McDermott and McDermott (at p. 283) refer to the judgment of Kingsmill Moore J. in *Godley v Power*

(1961) 95 ILTR 135 that for a contract to be enforceable, the memorandum must contain:

> i. The parties;
>
> ii. The property;
>
> iii. The price; and
>
> iv. All others terms which the parties considered essential to the contract

125. The Court has heard various formulations of the proposed note or memorandum. The most basic form was that the memorandum consisted of the Receipt dated the 21st of November, 2016 that bears the signatures of Chris Allen, Bob Lanigan, Maria Keena, and Ciara O'Mongain. Another formulation submitted by the plaintiff is that the note or memorandum consists of the Receipt, taken together with certain e-mails exchanged between Darren Das of Capita Asset Services and Terry Byrne, Frank Cronan, and Barry Cunningham at 20:18 on the 21st November, 2016, and an e-mail from Christopher Allen to Andrew Geraghty and Darren Das at 20:41 on the 21st November, 2016.

126. As for the question of identifying the parties, in *Guardian Builders v Kelly* (Unreported, High Court, 31st March, 1981), Costello J. confirmed that the test is whether the parties could be readily identified from the memorandum. In that case, the name of the plaintiff company had been misstated. Costello J. held (at p. 10): –

> "It is also suggested that the parties were not identified. I think they were. Although referred to by individual name in the case of Mr. Kelly, it is nonetheless sufficient, and the error in the name of the plaintiff company does not invalidate the identity of the parties. Again, the test is whether the parties can be readily identifiable."

127. The Receipt, alone, does not provide any sort of description for each of the signatures apart from that of Ciara O'Mongain as witness. In *Dewar v Mintoft* [1912] 2 K.B. 373, Horridge J. noted that the memorandum "must state both who was vendor and who was purchaser". It is not sufficient that a name merely appear on a document.

128. In considering the efficacy of a note or memorandum, the Court may have regard to oral evidence (See *Bacon v. Co Ltd v. Kavanagh* (1908) 42 I.L.T.R. 120, referred to by Buckley, Conroy, and O'Neill at p. 76). However, I have already found that the plaintiff's evidence, at its highest, does not identify the precise parties to the alleged contract, nor does it bring clarity to the capacity in which any of the three signatures were applied. The Receipt does not contain or reference any description of the property. As for the price, it is arguable that by reference to other evidence (see below) the references in the photocopied bank draft to the amount of the deposit could be relied on. That would be questionable, but the Receipt on its own clearly fails the test for the first two "Ps".

129. The Court, therefore, turns its attention to the proposed joinder of the e-mails with the receipt in order to constitute the required memorandum. A progressively liberal approach has been adopted by the courts in relation to the joinder of documents, with the judgment of Kenny J. in *McQuaid v. Lynam* [1965] 1 I.R. 564 (at p. 570) setting out the requirements:–

> "I think that the modern cases…establish that a number of documents may together constitute a note or memorandum in writing if they have come into existence in connection with the same transaction or if they contain internal references which connect them with each other. But as the memorandum or note considered as a whole must be signed, it would seem to follow that the document which is signed must be the last of the documents in point of time, for it would be absurd to hold that a person who signed a document could be regarded as having signed another document which was not in existence when he signed the first."

130. However, the requirement that the signed document be the last to be the final document to come into existence has been applied rather loosely. In the same case, Kenny J. stated (at p. 571):–

> "If, however, on the same occasion and as part of one and the same transaction – for example, as here, the payment of a deposit under an oral agreement for sale – a vendor and purchaser sit down at a table and respectively write out a receipt and a cheque, then, assuming that these documents between them sufficiently evidence the terms of the bargain, it would be going too far to say that the vendor could not rely on them as constituting a memorandum if the purchaser signed his cheque a few seconds before the vendor signed the receipt."

131. As to whether the three documents were contemporaneous enough to satisfy *McQuaid v Lynam*, it appears that the e-mails relied on were exchanged almost immediately after the plaintiff departed from EY on the night of 21st November, 2018. Therefore, I take the view that this, although a separate event entirely, was sufficiently close in time for this test.

132. This means that both the price and the property are described within the collection of documents relied on and would satisfy two of the required "three Ps". This can be seen clearly when the relevant e-mails are examined in full:–

> "To: tbyrne [*redacted Cerberus e-mail*]; Frank Cronan [*redacted Cerberus e-mail*]; Barry Cunningham [*redacted Cerberus e-mail*]
>
> From: Darren Das (Capita Asset Services)
>
> Sent: Mon 21/11/2016 20:17:32
>
> Subject: Michael Dempsey – Ard Ri Hotel
>
> Terry, Frank,
>
> The proposed purchaser (or his representatives) at €1.6m has hand delivered a bank draft for €160,000 to EY's offices in the last few minutes.
>
> They have advised the deposit is non-refundable subject only to title – you might confirm this is accurate.
>
> Kind regards,

Darren Das,

Senior Asset Manager."

The second e-mail relied upon reads as follows:–

"From: Christopher Allen [*redacted*]

To: Andrew Geraghty [*redacted Capita e-mail*]; Darren Das (Capita Asset Services) [*redacted Capita e-mail*]

CC: AranGCS [*redacted Capita e-mail*]

Date: Mon, 21 Nov 2016 20:41:08 +0000

Attachments: [*A copy of the deposit*]

Andy/Darren,

Please see attached. I will arrange for this to be lodged in the morning.

Kind regards,

Chris.

Chris Allen | Executive | Transaction Advisory Services"

133. Once again, the critical absent reference is to the parties, and the e-mail from Mr. Das merely referred to "the proposed purchaser (or his representatives)", a formulation at odds with any understanding that Maria Keena is the sole purchaser.

Part Performance

134. The plaintiff submits that in the event it is determined that there is not a sufficient note or memorandum for the purpose of s. 51 of the 2009 Act, she can rely on the doctrine of part performance.

135. Firstly, if the facts justify application of the doctrine of part performance, this will cure the absence of an adequate note or memorandum. It will not cure the absence of a concluded contract containing the essential terms. That is the end of the matter. I shall, however, briefly consider the submissions made on this point.

136. The act of part performance relied on is the payment of what the plaintiff describes as a non-refundable deposit. The doctrine requires that a plaintiff have acted to their detriment (see *Howlin v. Power (Dublin) Limited* (Unreported, High Court, McWilliam J., 5th May, 1978).

137. It is accepted that the defendants never lodged the bank draft for the deposit, and that they returned it to Messrs. Keller & Sons, Solicitors. Although Messrs. Keller & Sons refused to accept its return and sent it back again to Messrs. Mason Hayes & Curran, the fact remains that although the plaintiff and her witnesses consistently describe it as a "non-refundable deposit", it was, in fact, never lodged by the defendants and was tendered for repayment: a factor considered by McWilliam J. in *Howlin v Power* to undermine the claim of prejudice.

138. The plaintiff also submits that the conduct of the defendants was unconscionable in standing by and allowing the plaintiff to approach Ulster Bank to obtain the draft and travel to Dublin once she believed she had a concluded agreement for the purchase of the hotel, and then receiving the deposit from her. In circumstances where the deposit was not retained by the defendants, it does not seem to this court that the act of driving to Dublin in reliance on Mr. Lanigan's report of his view, now found to be mistaken, that an agreement had been concluded, gives rise to an application of either the doctrine of part performance or any other principle which would overcome the absence of a note or memorandum for the purposes of s. 51.

Conclusion

139. It is clear that in no case can the existence of a concluded contract for the sale of land, however basic or rudimentary, be declared if there is any one of the "three Ps" absent Many of the cases in which there is a dispute as to whether the parties are identified in an agreement for sale of land relate to the identity of a vendor (see *Globe Entertainment & Anor v. Pub Pool Ltd & Ors* [2016] IECA 272). However, the requirement to reach agreement on the identity of both parties is so fundamental that it clearly applies equally to the identity of the purchaser. In this case I have found that, accepting the evidence of the plaintiff's witnesses and taking it at its height, the plaintiff has not demonstrated that there was an agreement between her and any of the defendants in which this fundamental ingredient – the identity of the purchaser – was known to the defendants, much less agreed. Accordingly, the plaintiff has failed to make out a *prima facie* case and I shall grant this application to dismiss.